

CANADIAN PACIFIC FINANCE, INC.
EMPLOYER STATUS DETERMINATION ON RECONSIDERATION

This is the reconsideration decision of the Railroad Retirement Board as to whether Canadian Pacific Finance, Inc. (hereafter CPUSF) is an employer under the provisions of the Railroad Retirement and Railroad Unemployment Insurance Acts.

According to information provided for the Board's original determination, CPUSF was incorporated on January 25, 1991, is privately held and is under common ownership with the Soo Line Railroad Company and the Delaware and Hudson Railway, both of which are carriers subject to the Interstate Commerce Act. CPUSF has 14 employees. Seven of these employees are also officers of either or both of its affiliated railroads. According to the evidence of record, for the year ended December 31, 1992, 38% of the company's business and 67% of the Company's revenues came from its affiliated railroads.

The definition of an employer contained in section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

The term "employer" shall include--

(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *. [Emphasis supplied.]

Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially similar definition.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail

CANADIAN PACIFIC FINANCE, INC.

carrier. The absence of actual exercise of that control does not determine whether common control as provided in section 1(a)(1)(ii) exists; the right or power to exercise control is sufficient. See 20 CFR 202.4. The Board found that CPUSF is under common control with the Soo Line Railroad Company and the Delaware and Hudson Railway due to their common ownership. CPUSF does not argue with this finding; in its Memorandum in Support of Request for Reconsideration CPUSF states "(W)ith respect to the definition in (ii) above, CPUSF is not itself a rail carrier, but is under common control with two railroads, the Soo Line Railroad Company and the Delaware and Hudson Railway Company, Inc."

However, as CPUSF states in its Memorandum, this is only the first part of the definition test set forth in section 1(a)(1)(ii). Since it is not itself a carrier by rail, in order to be found to be an employer under the Acts, CPUSF must, in addition to being under common control with one or more railroad employers, be performing "services in connection with the transportation of passengers or property by railroad."

CPUSF argues that the services it performs are strictly in the financial area, and "in no way relate to transportation of property or passengers." In making this argument CPUSF refers to draft regulations which have been considered but never adopted by the Board. As these regulations are merely draft regulations, they have no precedential value. In determining whether or not CPUSF performs a service in connection with railroad transportation, the Board must look to its existing regulations and precedential decisions.

The question of what constitutes "services in connection with the transportation of passengers or property by railroad" has been litigated on several occasions. In Adams v. Railroad Retirement Board, 214 F. 2d 534 (9th Cir. 1954), the Court held that the provision of "accounting services, the services of a purchasing department, * * * correspondence and stenographic services * * * bridge and building services, a safety engineer and repairs for its automotive equipment and its general rolling stock" by a carrier's affiliate were services in connection with rail transportation so as to render the affiliate an employer under the Acts. Adams, at

CANADIAN PACIFIC FINANCE, INC.

542. In Southern Development Co. v. Railroad Retirement Board, 243 F. 2d 351 (8th Cir. 1957), the Court, at 355, held that a railroad affiliate which owned and operated an office building "almost exclusively for use by a railroad company for ticket selling and general offices could reasonably be considered [to be performing] a service connected with and supportive of rail transportation" and was an employer under the Acts. In Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir. 1983), the court held that the provision of Crossties by a manufacturer to its railroad carrier affiliate was "supportive of transportation and essential to its proper functioning." Railroad Concrete Crosstie, 709 F. 2d at 1410, quoting Southern Development Co. Consequently, the manufacturer of Crossties was found to be an employer under the Acts.

In Itel Corp. v. United States Railroad Retirement Board, 710 F. 2d 1243 (7th Cir. 1983), the court held that the leasing of rail cars is not a service in connection with the transportation of passengers or freight by rail. The Seventh Circuit read section 1(a)(1)(ii) of the Act as applying to services covered by the Interstate Commerce Act or where the related entity exists to serve the rail carrier affiliates and where its primary purpose is to remove employees from coverage under the Railroad Retirement Act. Itel, at 1248.

In a later decision, Standard Office Building Corporation v. U.S., 819 f. 2d 1371 (7th Cir. 1987), the Seventh Circuit was somewhat critical of its reading of section 1(a)(1)(ii) in the Itel decision, and more recently, in Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1992), the court declined to follow Itel in regard to limiting the coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts to services which are covered under the Interstate Commerce Act. Livingston Rebuild Center rebuilt locomotives and other rolling stock, about 25 percent of its business being with its affiliated carrier. The Court found that rebuilding locomotives constituted a service in connection with rail transportation, stating in regard to the legislative history of the Railroad Retirement Act that:

* * * Nothing in what Congress enacted links the Railroad Retirement Act to the Interstate Commerce

CANADIAN PACIFIC FINANCE, INC.

Act; neither the phrase "service . . . in connection with the transportation of passengers or property by railroad" nor any close approximation appears in the jurisdictional provisions of the Interstate Commerce Act. Senator Wagner thought the text of the Railroad Retirement Act encompassed more than the Interstate Commerce Act did, 81 Cong. Rec. 6223 (1937), and the committee report implies that the Railroad Retirement Act is broader. S. Rep. No. 6976, 75th cong. 1st Sess. 7 (1937). [970 F. 2d at 298.]

CANADIAN PACIFIC FINANCE, INC.

CPUSF provides tax, cash management, internal audit and financing services to its affiliated railroads. These are comparable to the services found to be services in connection with transportation in Adams, supra. Furthermore, the Board notes that according to the original documentation provided, 38% of CPUSF's business and 67% of its revenues are derived from the services provided to its affiliated railroads. In its Memorandum, CPUSF states that for 1993 31% of its revenue came from railroad affiliates, and in 1994, it was 38% of its revenue. This is still considerably more than the 25% level of affiliate service at issue in the Livingston case.

A majority of the Railroad Retirement Board finds that CPUSF is under common control with a carrier subject to the Interstate Commerce Act and that CPUSF is performing services in connection with the transportation of passengers or freight by railroad. Accordingly, in the opinion of the majority, CPUSF is an employer subject to the Acts.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

(Dissenting)

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